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No. 02-1114

In The

Supreme Court of the United States

ELAINE MATTHEWS,

Petitioner,

vs.

COLUMBIA COUNTY and RICHARD REYNOLDS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. The following two questions are raised by Petitioner's Brief:

1. This Court has repeatedly held that local governments may only be subjected to liability under Section 1983 through the actions of municipal officers who have "final policymaking authority." Should that clear legal precedent of this Court be overturned?

2. This Court has repeatedly held that elected officials are entitled to legislative immunity for voting upon ordinances which reflect "discretionary, policymaking decisions." Should that clear legal precedent of this Court be overturned?

B. In order for Petitioner to recover, the following two issues would also have to be decided:

3. Did Petitioner's routine, innocuous comments made during the course of her employment rise to the level of protected "speech"?

4. Was there sufficient evidence to support an award of $200,000 for Petitioner's claim for emotional distress damages, when she received no professional help and relied solely upon the testimony of herself and her husband that she was upset for a time after her job was eliminated?

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STATEMENT OF THE CASE

Petitioner was first employed by Columbia County, Georgia in 1977. R14-122.[1] In 1988 she was given the title of Clerk of the Board of Commissioners. R14-125. The Clerk's position is not a full-time job, but is a title held by a person who holds full-time employment in another county job. R14-222-223. In 1991 she took over her former boss' position and became Director of the Department of Administrative Services. R14-228. Although she had been moved to the position of Director of Administrative Services, she retained the title of County Clerk as well. As director of a department, Petitioner had discretionary authority to set policies and was exempt from the County's civil service ordinance. Columbia County Code (the "Code") § 2-2-130 (Def.Ex.3, pp. 33-34); § 2-11-3(2) (Def.Ex.4). Petitioner served in her capacities as a Department Director and as Clerk at the pleasure of the Board. Code §§ 2-2-60, 2-2-131 (Def.Ex.3, pp. 18, 33).

The genesis of the reduction in force ordinance ("RIF Ordinance") was the struggle to balance the county budget for the 1993-1994 fiscal year. Budgets are contentious matters, and none of the five commissioners wanted to raise taxes. R14-99-101. A commissioner from one faction of the Board (Mike Graybill) floated a RIF plan that would eliminate at least three department head positions. R15-740-741. In response, Respondent Reynolds, the Commission Chairman, came up with an alternative reorganization plan which eliminated eight positions, only one of

[1] This citation refers to Record Volume 14, page 122. Citations to the Record in this brief follow this same format throughout.

which was a department head (including Petitioner's). Def.Ex.5.

On June 23, 1993, the Board by a 3-1 vote adopted Reynolds' plan in the form of a Resolution "providing for a reduction in force of County employees in order to meet budgetary goals." Def.Ex.5, p.1. The Resolution stated that the County was

> faced with the need to reduce expenses of the County government in order to meet the budgetary goals for fiscal year 1993-94 and to reduce expenses to a level that will not exceed anticipated income. . . . [T]he Board [], after study and consideration of various alternatives has reluctantly determined that a reduction in force by the layoff of certain employees is necessary as a part of the overall plan to keep expenses at a level below anticipated income.

Id. The Resolution also provided a severance benefit to the affected employees (including four month's salary for Petitioner), and expressed gratitude for their service. *Id.*, pp. 4-5.

The Resolution was approved by Commissioners Reynolds, Ford and Titus, and it was thought that the plan would save over $200,000 for the fiscal year. Pl.Ex.15, pp. 2-3. An Ordinance enacting the reduction was subsequently adopted after its second and final reading on July 6, 1993. Def.Ex.6. All five commissioners signed the RIF Ordinance. *Id.* at p. 25.

Petitioner's Department (and the position as Director of Administrative Services) was eliminated by the RIF Ordinance, and thus she no longer was a full-time employee. Her duties as Clerk were reassigned to an existing

full-time employee whose position was not being eliminated. R14-221-223. This reassignment was in conformance with an existing ordinance which stated that "the office of Clerk may be combined with any other office of the County." Code § 2-2-64 (Def.Ex.3, p. 19). It was also consistent with the goal stated in the Resolution of lowering costs for the 1993-94 fiscal year through the reduction in force. Def.Ex.5.

Meanwhile, in a wholly unrelated matter, Columbia County had been looking for a way to handle its impending landfill space shortage and to comply with a State statute calling for a reduction in solid waste going into the landfill. R14-306-307; R15-753. The County requested proposals ("RFP's") as to ways to reduce its volume of solid waste and as to what each proposer would charge to implement its proposal. R14-312-313. The County received proposals from several different companies to do this work, each with different technologies and designs as to how best solve the landfill space problem. Pl.Ex.42. These requests for proposals were not "bids", and their review did not fall under Petitioner's department. (R14-224-226). The proposals were reviewed and assessed by the Atlanta office of Black and Veatch, an internationally known engineering firm. R15-756. The review process took several months and resulted in a recommendation that the proposals of two companies – Renaissance, Inc. and Resource Recycling Technologies, Inc. – should be given further consideration. Pl.Ex.2.

Petitioner testified that she became aware of certain information about Renaissance during the course of her employment, and that she passed this information along to Reynolds at work and during a conversation about work when they ran into each other at a local store. None of the

information passed along was inflammatory or proprietary to Renaissance, and was unremarkable in content. Specifically, the information passed along by Petitioner (according to her own testimony) over a period of four or five months was (1) that she had been contacted by a reporter asking if she had heard of Renaissance or one of its agents, Joe Rabun (she claims to have passed this information along on two separate occasions); and (2) that she had been contacted by the Clerk of Wayne County, Georgia asking about a rumor that Columbia County had already entered into a contract with Renaissance. R14-149-154. She repeated these innocuous comments again to Commissioner Reynolds when they ran into each other at a local store after Reynolds had returned from an inspection of Renaissance's landfill operation in Miami. R14-157. Matthews also (3) informed the County Administrator (in Reynolds' presence) about a newspaper article regarding a company associated with Renaissance that had permitting problems in Florida. R14-155-156.[2]

Petitioner testified that when she passed along one of these comments, it appeared to agitate Mr. Reynolds, who (allegedly) told her that he was tired of "rumors and innuendo." R14-154. Petitioner also testified that she asked Administrator Steve Szablewski whether a bid bond would be required for the requests for proposals, even though the duty of preparing and reviewing these proposals fell to the County Administrator (Mr. Szablewski) and

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[2] Petitioner also testified (4) that an engineer called her to inquire whether Renaissance was assured of getting a contract on the project. R14-154-155. There was no evidence that any of this was passed on to Commissioners Reynolds, Ford or Titus.

not Petitioner. R14-224-226. Although no bond was required by law, Mr. Szablewski and the County Attorney decided that it would not hurt to request bonds with the RFP responses. R15-768-769.

In the fall of 1993, contract negotiations were begun with Renaissance which culminated when Commissioner Reynolds made a motion in a meeting on May 17, 1994 to enter into contract with Renaissance. R15-773-774. This motion was not supported by any other commissioner (including Ford and Titus), and it died for lack of a second. *Id.* Renaissance never received a contract from Columbia County. *Id.*

Several of Petitioner's misstatements of fact must be addressed directly. Petitioner alleges a conspiracy between three commissioners to fire Petitioner at the behest of Renaissance, and states the existence of the alleged conspiracy as if it were established fact. There is no credible evidence to suggest a conspiracy to silence Petitioner in any way, and this allegation is flatly denied. The only witness who attempted to draw such a link was Joe Rabun. Two witnesses specifically testified that they would not believe Mr. Rabun even if he testified under oath. R15-780 (Ralph A. Lewis), 782 (Hilda Alexander). The jury apparently did not believe Mr. Rabun, either, because the jury found (contrary to Rabun's testimony) that Commissioners Ford and Titus were not motivated by improper purposes.

Petitioner references a quote that "if anyone was going to go, its going to be Elaine Matthews" as further "evidence" of a conspiracy. *Petition*, p. 5. Petitioner conveniently fails to mention, however, that this comment was allegedly made by a commissioner exonerated by the jury

(Ms. Ford). R14-484-485. Indeed, the witness (Beng Brennon) testified that "I don't remember her specific words, but it was something like if anyone should go it should be Elaine Matthews." R14-484-489. Petitioner's "quote" of her testimony is thus not only taken out of context, but is misleading.

Petitioner argues that something was amiss when Renaissance did not follow proper "bid" procedures. *Petition*, pp. 5-6. Petitioner herself acknowledged at trial that "requests for proposals" are reviewed by the County Administrator, while "bids" have different procedures and were reviewed by Petitioner. R14-224-226. Petitioner's own exhibits clearly show that what was involved in the case is a "request for proposal" and *not* a bid. Pl.Ex.20 ("Request for Proposals on Material Recovery and Volume Reduction Facilities for Columbia County, Georgia"), Pl.Ex.22 ("Objective for Request for Proposals on Material Recovery and Volume Reduction Facilities"), Pl.Ex.65 ("Addendum No. 1 to Request for Proposals on Material Recovery and Volume Reduction Facilities"), etcetera. Respondents deny any "bid" was involved.

Finally, Petitioner states as established fact that one or more commissioners were bribed by Renaissance to fire her. This allegation is unequivocally denied. Again, the only witness who attempted to make such a link – Mr. Rabun – was successfully impeached by two witnesses who testified that they would not believe Mr. Rabun if he swore to tell the truth under oath. The jury's rejection of his testimony was evidenced by its exoneration of the other commissioners in the face of Rabun's assertions.

REASONS FOR DENYING THE PETITION

Petitioner's job duties included the passing along of information to Respondents on a wide range of county business. One of the many local issues percolating at the time of the RIF was the need to address the future of the County's landfill. Any alleged "speech" by Petitioner on that issue consisted of passing along innocuous statements as part of her job, and did not rise to the level of protected speech. Indeed, two of the three commissioners who voted for the RIF Ordinance (Commissioners Titus and Ford) testified they were unaware of any communication about Renaissance by Petitioner (R15-814-815, 845-847), and that any activities Petitioner had in regard to Renaissance were wholly unrelated to the RIF Ordinance.

The RIF Ordinance was adopted to fulfill budgetary goals, and is the type of legislative action long afforded individual immunity. Simply stated, the legislative process would cease to function if legislators were subjected to lawsuits at the mere allegation that their discretionary policy choices were implemented for improper purposes. Indeed, Respondents believe that the lone finding of improper purpose against Commissioner Reynolds is as much a function of political passion as anything else, and is the type of result foreseen by this Court in its legislative immunity opinions. Petitioner's claim was thus properly dismissed against Respondent Reynolds by the trial court.

The claim against Respondent Columbia County was properly dismissed by the appellate court below. The jury specifically found that the majority of the commissioners who voted for the RIF Ordinance did not have any improper motive in adopting it, and the sole individual who

had an alleged improper motive did not by himself have final policymaking authority to bind the County as a matter of law or fact. Under the holdings of this Court and the various appellate courts, the taxpayers of Columbia County cannot be held liable under such facts.

This case falls within clear and established precedent of this Court, and does not involve novel issues of law or conflicts with the decisions of either this Court or another United States Court of Appeals. Petitioner's claims were correctly dismissed below. The Petition for Writ of Certiorari should therefore be denied.

ARGUMENT

I. COMMISSIONER REYNOLDS DID NOT HAVE FINAL POLICYMAKING AUTHORITY TO ADOPT THE RIF ORDINANCE. RESPONDENT COLUMBIA COUNTY, GEORGIA CANNOT BE HELD LIABLE FOR HIS ACTIONS UNDER THE CLEARLY ESTABLISHED PRECEDENT OF THIS COURT AND THE APPELLATE COURTS BELOW

This Court has clearly established that municipal liability under 42 U.S.C. § 1983 – and thus the liability of its taxpayers – rests upon the actions of an official or officials with "final policymaking authority." *See, e.g., Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *City of Saint Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). The identity of who has such authority is a matter of state law. *Jett*, 491 U.S. at 737. The lone individual believed to have an improper motive – Respondent Reynolds – did not have such authority as a matter of state law or established fact. Under the holdings of this Court and the appellate courts

below, there is no reason to disturb the holding of the lower appellate court in this action.

According to the jury's verdict, only Commissioner Reynolds voted for the restructuring plan with the intent to retaliate against Petitioner or to silence her as a critic of Renaissance. The vote for the restructuring was three commissioners in favor and one against (with one absent), and all five commissioners signed the RIF Ordinance. Thus, assuming Petitioner's First Amendment rights are even implicated here, the issue becomes whether Columbia County may be liable for passing the RIF Ordinance if only one of the commissioners voting in favor of the restructuring and enacting the Ordinance did so because Petitioner had engaged in alleged protected speech.

There can be no liability for the taxpayers of Columbia County under these facts. As the appellate court below succinctly held, Reynolds' lone actions could not bind the County to such liability:

> That a local government "may only be held liable under Section 1983 if action pursuant to official . . . policy of some nature caused a constitutional tort" is well-settled law. *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 109 S. Ct. 2702, 2719 (1989)). And, "[o]nly those municipal officers who have final policymaking authority may by their actions subject the government to § 1983 liability." *Id.* (quoting *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 924 (1988) (plurality opinion)). In this case, Commissioner Reynolds does not possess final policymaking authority by himself; that authority rests with the entire Board of Commissioners.

> Because policymaking authority rests with the Commission as an entity, the County can be subject to liability only if the Commission itself acted with an unconstitutional motive. An unconstitutional motive on the part of one member of a three-member majority is insufficient to impute an unconstitutional motive to the Commission as a whole. *Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001) (granting summary judgment to municipality where plaintiff had only shown evidence that one member of a three-member majority had voted to fire plaintiff for a discriminatory reason); *cf. Church*, 30 F.3d at 1343 (concluding that comments of one city councilman suggesting an unconstitutional motive was insufficient to show that the city council had authorized an unconstitutional policy).

Petition, 6a-7a.

The reasoning of the Eleventh Circuit in the *Church* case is instructive, and is in concert with the other appellate circuits. In *Church*, the court held as follows:

> The imposition of municipal liability requires a decision by a final policy maker, not a "principal" one . . . The plaintiffs concede that, under Alabama law, final policymaking authority vests with the entire five-member City Council and the Mayor, yet the plaintiffs have produced no evidence to suggest that the Council and the Mayor have delegated this authority to Kling. (cits.) . . . Although Kling suggested a zoning change to restrict shelters for non-residential areas, the council never made such a change. That fact, by itself, establishes that Kling is not the city's final policymaker on the issue of the homeless; if he were, the zoning change would have been made.

> *The plaintiffs may not prevail on the basis of the actions or words of a single Council member, such as Kling.*

Id. at 1343. (emphasis added).

Here, Reynolds did not have the authority to unilaterally bind the County to the RIF Ordinance or to the hiring of Renaissance. The affirmative vote of a majority of present and voting commissioners is required by law. Code § 2-2-4(5)(d) (Def.Ex.3, p. 8).

It is important to note that Renaissance *never received a contract from Columbia County*. Eleven months after the elimination of Petitioner's former position, Commissioner Reynolds moved that Columbia County enter into a contract with Renaissance, but the motion died for lack of a second. R15-773-774. Neither Ms. Ford nor Mr. Titus supported this motion and thus it never even came to a vote. As with Mr. Kling in *Church*, "this fact, by itself, establishes that [Reynolds] is not the [County's] final policymaker" because if he were, Renaissance would have gotten the contract. 30 F.3d at 1343.

The First Circuit Court of Appeals has also decided a case with almost the identical legal issue as the one at bar. In *Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st Cir. 1997), *reversed on other grounds, sub. nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998), Ms. Scott-Harris filed suit under 42 U.S.C. § 1983 against a municipality and several of its officers, alleging that the elimination of her department (in which she was the sole employee) was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights. The ordinance which eliminated plaintiff's department was approved by six of the nine city council members. At

trial the jury found that the defendants indeed violated plaintiff's First Amendment rights. The First Circuit nonetheless dismissed the claim against the city, because the plaintiff only presented sufficient evidence for a jury to deduce that two of the six council members (Roderick and Mitchell) along with the Mayor (Bogan) acted out of an improper motive.

> [I]ndeed, the record tells us almost nothing about the inclinations of the silent seven . . . [T]he stark fact is that the motivations of the council members – other than Roderick and Mitchell – did not receive individualized scrutiny. *By any responsible standards, the sparse evidence falls short of providing a proper predicate for a finding of municipal liability.*

Scott-Harris, 134 F.3d at 439 (emphasis added). This Court did not disapprove of the lower court's finding in this regard when brought before it on certiorari.

The First Circuit reached this conclusion under the best possible scenario for any plaintiff. First, *the jury specifically found* that "[Plaintiff]'s constitutionally protected speech was a substantial or motivating factor behind [Bogan's and Roderick's] conduct." 523 U.S. at 54. Second, *the trial court specifically found* that the ordinance "was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff." *Id.* at 48. Third, *the trial court expressly found* that the decision "relied on facts relating to a particular individual [Scott-Harris] in the decision-making calculus." *Id.* Despite these concrete findings, the municipality still could not be held liable because there was no finding that at

least a majority of the policymakers had any improper motive.

Petitioner's case is not even as strong as the one rejected in *Scott-Harris*. In *Scott-Harris*, there was no scrutiny of several of the commissioners who voted for the Ordinance eliminating the plaintiff's job. Here, by contrast, a jury has expressly considered the evidence and found that Petitioner's speech was *not* a motivating or substantial factor in the decision of a majority of the board. In *Scott-Harris*, the plaintiff's job position was the only one eliminated; here, eight positions were cut. The plaintiff in *Scott-Harris* had a long laundry list of comments and activities which could fall under protected speech (including a "shouting match" with a city councilman over the use of ethnic comments, and bringing charges against a co-worker who repeatedly referred to her as "a black nigger bitch" or "a little black bitch"). 134 F.3d at 430-31. Here, in stark contrast, Petitioner at most passed along messages she received as a department head or Clerk of the County about an aspect of County business, and does not nearly approach the outrageous facts of *Scott-Harris*.

Other circuits have adopted the reasoning of the *Church* and *Scott-Harris* decisions. In *Gupta v. The Town of Brighton*, 1999 U.S. App. Lexis 13961 (2nd Cir. 1999), the Court held that:

> [w]hile Gupta has made allegations of improper motive by two of the board members, he has made no substantiated allegations that the remaining three board members were so motivated. As a result, there is insufficient evidence

> of causation of either discrimination or retaliation, and both claims were properly dismissed.

Id. at 3.

Petitioner does not directly address the well-settled principle that liability arises *only* from final policymakers. Rather, Petitioner alleges that there are different tests percolating in the circuits below to resolve the situation presented in this case. The differences between the cases cited by Petitioner are not caused by a fissure in the Appellate Courts. Rather, the supposed differences result from the distinction between ruling on the issue prior to the conclusion of a trial, and ruling after a jury vindicated all but one commissioner. There is no relevant conflict between the ruling of the Eleventh Circuit in this case and the other circuit courts.

Petitioner's reliance on the Eighth Circuit's decision in *Scamardo v. Scott County, Arkansas*, 189 F.3d 707 (8th Cir. 1999), and the Third Circuit's decision in *Azzaro v. County of Allegheny*, 110 F.3d 968 (3rd Cir. 1997), illustrate this point. Both *Scamardo* and *Azzaro* concern the issue of whether governmental liability could be ruled upon prior to verdict or whether the question should go to a jury. In the case at bar the jury has found that only one commission member had an improper motive; the issue of whether the case should have gone that far is thus mute.

While it is true that Commissioner Reynolds may have influenced the other commissioners to vote for the RIF Ordinance, *the jury has found that the others did not vote for improper purposes*. The jury correctly found that Commissioners Ford and Titus were not influenced by any motive to infringe upon the speech of Petitioner. In fact,

the evidence shows that they did not even know of any comments Petitioner made about Renaissance, R15-814-817, 845-847, and she never testified that she made any remarks to them or in their presence. The evidence establishes that they voted for the restructuring and reduction in force for budgetary reasons: to insure a balanced budget, and to provide cost of living raises to the remaining County employees. R15-812-813; Def.Ex.5.

Scamardo and *Azzaro* thus, at best, indicate that the issue cannot be resolved as a matter of law prior to the close of all evidence but must go to the jury. Because the jury found that the majority of commissioners voting for the RIF Ordinance were *not* motivated by Petitioner's alleged comments, *Scamardo* and *Azzaro* do not require a different result. There is thus no relevant split in authority as suggested by Petitioner.

Petitioner also attempts to distinguish the clear precepts of *Church*, *Scott-Harris*, and others on the theory that the three commissioners often voted as a bloc in order to get their legislation passed, ergo Reynolds' (allegedly) improper intent could be imputed to the other two because he helped influence them to vote for the RIF Ordinance. Such an argument ignores the very basis of legislative government, and a holding along the lines supported by Petitioner often would eviscerate the ability for any legislative body to govern. In this case, two commissioners voted for the RIF Ordinance for proper fiscal purposes. If the law is as Petitioner claims, all legislative bodies will be subject to suit if a plaintiff merely alleges that a single member who voted for a particular measure had (or may have had) an improper purpose and some influence for whatever permissible reason with other decision makers – even if the majority had legitimate grounds to vote for it.

This creates a hunting license for every person or special interest group who is on the "losing" end of legislation to scour the personal histories of legislators on any close vote to try and attack the legislation in Court.

One may speculate, from the evidence at trial, that there was some loyalty among three commissioners as a voting bloc in order to insure that the legislative priorities of each of them would be able to gather a majority vote. But even if that voting group loyalty played a part in the decisions of Ford and Titus, *it is not evidence of retaliatory animus that would support Petitioner's First Amendment claim*. Moreover, the fact that Reynolds could not get the other two commissioners to vote to give a contract to Renaissance shows, as in *Church*, that he was not the principal decision-maker so as to create liability for the taxpayers of Columbia County.

The lower appellate court correctly dismissed Petitioner's claim against Respondent Columbia County.

II. INQUIRING INTO THE MOTIVES OF LEGISLATORS IS NOT CONSONANT WITH OUR SCHEME OF GOVERNMENT, AND LEGISLATIVE IMMUNITY BARS THE ACTION AGAINST RESPONDENT REYNOLDS

Almost from the earliest decisions of this Court, there has been a recognition that legislative motives are beyond the purview of the judiciary. *Fletcher v. Peck*, 10 U.S. 87 (1810), arose, interestingly enough, from the aftermath of the Yazoo land fraud in the State of Georgia. In the course of Chief Justice Marshall's opinion, he wrote the following:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null

> by a court, in consequence of the means which procured it, still there would be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon public sentiment?
>
> If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control that conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Id. at 130.

This same reluctance to delve into legislative motives was reiterated in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), where Chief Justice Rehnquist noted: "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Id.* at 170.

"The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Legislative immunity was not created to protect members for their own benefit, "but to support the right of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Id.* at 373-374.

Inquiring into the motives of legislators is "not consonant with our scheme of government," and even "the claim of an unworthy purpose does not destroy the privilege:"

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a (legislative body)'s inquiry may fairly be deemed within its province.

341 U.S. at 377-378 (footnote omitted).

This Court has already applied this principle to a case almost identical to the one at bar. In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the plaintiff filed suit under 42 U.S.C. § 1983 against a municipality and its officers, alleging that the elimination of plaintiff's department (in which she was the sole employee) was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights. The jury found that the defendants indeed violated plaintiff's First Amendment rights. Nonetheless, this Court dismissed the plaintiff's claims and unanimously held that local legislators are absolutely immune from suit under Section 1983 for their legislative activities. 523 U.S. at 49.

This result was mandated because "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" 523 U.S. at 94. This Court held that such a reduction in force was unquestionably within the "sphere of legitimate legislative activity" because it

> reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office.

523 U.S. at 55-56.

It is important to note that this Court found the reduction in force through eliminating job positions to be a legislative act as a matter of law, not a question of fact. This is evident because the Court reached this conclusion on a *de novo* review of the facts, as opposed to remanding the case or undertaking a "clearly erroneous" review of the facts which would be necessary if the question were one of fact instead of law. *See Anderson v. Bessemer City*, 470 U.S. 564, 566 (1985) (reaffirming that a finding of discriminatory intent in a Title VII case "is a factual finding that may be overturned on appeal only if it is clearly erroneous"). Indeed, this Court granted legislative immunity as a matter of law:

- *even though the jury had specifically found* that "[Plaintiff]'s constitutionally protected speech was a substantial or motivating factor behind [Defendant]'s conduct," *Bogan*, 523 U.S. at 48;
- *even though the trial court had specifically found* that the ordinance "was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff," *id.*; *and*

- *even though the appellate court had expressly found* that the conduct was administrative, rather than legislative, because the decision "relied on facts relating to a particular individual [respondent] in the decision-making calculus," *id.*

Thus despite the jury's findings, the trial court's findings, *and* the appellate court's findings, this Court unanimously held that "the city council, in eliminating [the plaintiff's job position], clearly governed 'in a field where legislators traditionally have power to act.' . . . Thus, petitioners' activities were undoubtedly legislative." 523 U.S. at 56 (*quoting Tenney*, 341 U.S. at 379). Budgetary resolutions and ordinances which eliminate job positions and reassign duties are therefore legislative, and not merely administrative, as a matter of law, and cloak their enactors with immunity.

The facts of the case *sub judice* fall squarely under *Bogan*. The Board of Commissioners adopted a Resolution "providing for a reduction in force of County employees in order to meet budgetary goals." Def.Ex.5. The Resolution recites that the reduction in force was enacted "to meet . . . budgetary goals," "to reduce expenses to a level that will not exceed anticipated income," and "to meet the financial needs of Columbia County." *Id.* Likewise, the reorganization of duties was enacted "[a]s a further step in the reduction of costs." *Id.* The Resolution and Ordinance therefore unquestionably "reflected a discretionary, policymaking decision implicating the budgetary priorities of the [County] and the services the [County] provides to its constituents," the very factors which this Court unanimously found were "undoubtedly legislative" and thus immune. *Bogan*, 523 U.S. at 55-56.

Petitioner urges the Court to go behind this legislative action to determine why the Commissioners decided to eliminate the eight positions (including Petitioner's). However, this Court expressly held that the motives behind the positions' elimination are *irrelevant* to the inquiry:

> [W]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity 'would be of little value if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.' . . . Furthermore, it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'

523 U.S. at 54-55 (quoting *Tenney*, 341 U.S. at 377).

Simply stated, the government agency in *Bogan* eliminated the plaintiff's department when she was the sole employee of that department. The jury found such action to have been taken in retaliation for plaintiff speaking out on a matter of public concern. The trial court itself, in denying the defendants' motion for judgment notwithstanding the verdict, specifically found that the ordinance was an individually-targeted administrative act. 523 U.S. at 54. The appellate court further found the termination to be an administrative act "relating to a particular individual." *Id. Despite this record*, this Court **unanimously** held that the legislators who enacted the legislation could not be held civilly liable. If the legislators in *Bogan* could not be held civilly liable despite a finding

they specifically targeted that plaintiff for firing, *and* that she was targeted in violation of Section 1983, then certainly the individual Respondent here (Mr. Reynolds) cannot be held liable on the heavily disputed allegation that the elimination of eight positions was enacted to injure Petitioner.[3]

Petitioner's contention that Reynolds made an administrative, and not legislative, decision is against the facts in any event. Reynolds described his reasons for proposing the RIF:

> Basically the first positions I looked at were the administrative positions, the ones that basically worked with the county commission. They were the highest salaried people in county government. I looked at the jobs that each individual was doing and I could see where some of those jobs could be farmed out to other departments and some of those positions could be eliminated and the salaries that were being paid to the people in those positions would be a cost savings to the county.

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[3] Petitioner's position as Director of Administrative Service was eliminated and all of her duties under the title of Clerk were transferred to existing employees. Petitioner's argument that she was administratively fired from her Clerk's position (while supposedly legislatively removed from her Director's duties) is to no avail. Her job loss, and the reassignment of her duties to existing full-time personnel, arose from the Resolution and Ordinance adopted for budgetary purposes and is wholly dealt with in those legislative enactments. Def.Ex. 5, 6. The entirety of her loss of employment was caused by this legislative act.

The elimination of these eight positions was thus, as *Bogan* held, clearly "within the sphere of legitimate legislative activity" as a matter of law. The alleged motives of Mr. Reynolds are irrelevant for purposes of Petitioner's claims against Mr. Reynolds in his individual capacity. 523 U.S. at 54-55. A directed verdict was therefore properly granted to Commissioner Reynolds in this case.[4]

III. PETITIONER'S SPEECH WAS NOT PROTECTED BY THE FIRST AMENDMENT

A. Petitioner Spoke as an Employee, and Not as a Concerned Citizen.

In order to prevail, Petitioner would have to establish that any "speech" she engaged in was constitutionally protected. The trial court denied Respondents' Motion for Judgment as a Matter of Law on the issue, and the appellate court did not reach the issue because it found against Petitioner on other grounds. *Petition*, p. 5a. This Court may have to rule on the issue if the Petition for Writ of Certiorari is granted, and Respondents believe it would defeat Petitioner's claim regardless.

This Court has made it clear that in order to determine whether a government employee's speech is

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[4] Petitioner has argued that the budget savings were canceled out by the hiring of additional employees some time after the reduction in force. Petitioner does not refute that some savings were therefore realized in fiscal year 1993-94 as envisioned by the Resolution and that the budget was met without raising taxes – the very purpose of enacting the RIF. In any event, the ultimate success or failure of the legislative initiative undertaken in the Resolution and Ordinance is irrelevant because immunity arises from the nature of the act itself.

protected, courts must look beyond the *content* or subject matter of the statement and examine the *context* or circumstances under which the statement was made, as well as the form in which it was expressed. *Connick v. Meyers*, 461 U.S. 138, 147 (1983). This is because almost every aspect of a public agency's operations conceivably could be considered "newsworthy" or of some public interest:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Connick, 461 U.S. at 149.

Here, Petitioner alleges that she was terminated as a result of innocuous comments she made to her superiors. Hers were routine comments on a "public" topic as would be expected in any public agency, and was clearly speech as an employee and not a citizen. *Connick*, 461 U.S. at 149. She could just as easily have selected comments she made about employee assignments or compensation, purchasing of office supplies or a myriad of other topics that routinely surfaced in her work. Thus, her comments were not protected because under the circumstances they were not made so as to invoke "the interest of the [employee], *as a citizen*, in commenting upon matters of public concern." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (emphasis added).

It is important to note that Petitioner never took her "complaints" outside of the chain of command or to the public at large. A plaintiff is not required to publish speech to the public in order for the speech to touch a matter of public concern. *Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 916 (11th Cir. 1993). However, the plaintiff's efforts to communicate the speech to the public are important in determining whether the employee spoke as a citizen or an employee. *Chesser v. Sparks*, 248 F.3d 1117, 1123 n. 6 (11th Cir. 2001); *Gomez v. Texas Dept. of Mental Health*, 794 F.2d 1018, 1022 (9th Cir. 1986) ("Whatever the significance of Gomez's speech . . ., he was not seeking to alert the public to any actual or potential wrongdoing or breach of the public trust. . . ."). No such efforts existed here.

Even if it were determined that she spoke in her role as a complaining citizen, the "content, form and context" analysis of *Connick* would balance in favor of the County government. This is so because the conversations she related were so routine and innocuous, they would not cause decision makers to know or even suspect that the reduction in force, which was neutral on its face and applied to seven other positions, could be categorized as infringing on protected First Amendment rights.

Petitioner has not been able to cite a single case where routine office communication has been held sufficient to invoke First Amendment protection and make actionable an adverse employment decision by the governmental body. Unlike all of the other cases, Petitioner's remarks were for the most part routine questions or information which had been relayed to her, and in no instance accusatory. They were so relatively unimportant in the scheme of things that they were never committed to writing or

formally presented to the full Board. Other comments were remarks back and forth to her supervisor, the County Administrator, who had no vote in the reduction in force. *See* R15-739. The speech did not involve the substance of the legislative issue being decided (which company's proposal best suited the County's need to address its landfill shortage), but rather passed along inquiries and information she received as a department head or clerk to her superiors. If the Court elevates the remarks of Petitioner to protected speech, then the barrier which *Connick* established will be breached.

B. Even If Petitioner's Speech Was Public, it Was Not Protected.

Even if this Court were to determine that Petitioner made a prima facie case, Respondents are entitled to judgment as a matter of law because the County's interest, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs Petitioner's First Amendment rights. *Pickering*, 391 U.S. at 568; *Chesser*, 248 F.3d at 2235. When an employee is terminated because the employee spoke out on an issue of public concern, the Court must balance the employee's interest in making the statement against interest of the employer in promoting the efficiency of the public services it performs through its employees. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). This balancing test, like the determination of public concern, is a matter of law for the court, not the jury. *Deremo v. Watkins*, 939 F.2d 908, 910 (11th Cir. 1991).

In deciding whether the scales for the *Pickering* balance tip in favor of the employer's or employee's

interests, the Court should examine the time, place and manner of the employee's speech. *Rankin*, 483 U.S. at 388. One factor critical to this determination is whether the speech has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary. *Id.* "[T]here may be limits on the extent to which an employee in a sensitive or policy-making position may freely criticize his superiors and the policies they espouse." *Abood v. Detroit Board of Education*, 431 U.S. 209, 230 n.27 (1977). "For some categories of employees such as those in a confidential or policy-making relation to their public employer, First Amendment constitutional protection is often slight." *Bates v. Hunt*, 3 F.3d 374 (11th Cir 1993) (Governor of Alabama has the absolute right to fire his administrative assistant for giving affidavit in support of co-worker's suit against the Governor).

A claim similar to Petitioner's was rejected in *Chesser*:

> Here, Sparks certainly had an interest in maintaining "loyalty, discipline and good working relationships among those he supervises." [cit.] Regardless of whether Chesser's interpretation of the FLSA was correct, Sparks may reasonably have believed that Chesser was being insubordinate and disruptive, and hence that he was justified in discharging her. In sum, Chesser cannot satisfy the second prong of the [*Pickering*] test; consequently, we need not move to the third and fourth prongs.

Chesser, 248 F.3d at 1124 (citing *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989)).

The Eleventh Circuit's holding in *Chesser* is in accord with other Circuits as well. In *Gonzalez v. Benavides*, 712 F.2d 142 (5th Cir. 1983), the county commissioners fired

the executive director of the community action agency because the director publicly challenged the commissioners' authority. The Court found that the *Pickering* test tipped in favor of the employer because the director held a "policy-level" position.

> There is a governmental interest in securing those unique relationships between certain high level executives and the elected officials at whose grace they serve. For this narrow band of relationships, refusing to grant First Amendment found tenure would seem to take away little freedom not already lost in accepting the appointment itself, at least when the appointive job has the sweep of authority and discretion as to be central to the elected official's duty.

712 F.2d at 148; *cf. Terry v. Cook*, 866 F.2d 373,376 (11th Cir. 1989) (Sheriff has absolute authority over the appointment and retention of deputy sheriff).[5] The Court found that the record "presents a possibility that the relationship between the commissioners and Gonzalez fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Gonzalez*, 712 F.2d at 150.

Petitioner similarly falls into that narrow band of relationships where loyalty trumps First Amendment concerns. In *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976), this Court explained that a policy-making employee is one

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[5] The situation where a "policy-making" employee is terminated as a result of his speech is closely related to the political patronage cases decided by this Court. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

with responsibilities that are not well defined or are of a broad scope. Petitioner was the Director of the Administrative Services Department. As such, she had discretionary authority to shape policy and formulate plans for the implementation of broad goals. Department heads are generally considered "policy-making" employees. *Roman Melendez v. Inclan*, 826 F.2d 130, 134 (1st Cir. 1987). The fact that the position of Director of Administrative Services is a policy-making position is made clear by the fact that the position is exempted from the Civil Service Ordinance, and that the Director serves at the pleasure of the Board.

Considering the low-key communication by Petitioner, her selectivity in passing on the comments to some commissioners and not others, and her failure to make any effort to alert the public at large, it is clear that her remarks fall into the category (at best) of "criticisms of internal management decisions" by an employee which are not protected as opposed to speech by a citizen "relating to matters of public concern." *Kurtz v. Vickrey*, 855 F.2d 723, 730 (11th Cir. 1988) ("the question is close as to whether these statements are better characterized as criticisms of internal management decisions or as relating to matters of public concern, . . .").

Petitioner's First Amendment rights were therefore not violated, and Respondents were entitled to judgment as a matter of law.

IV. THERE WAS INSUFFICIENT EVIDENCE TO SHOW MENTAL ANGUISH

The jury awarded Petitioner $200,000.00 for emotional distress, despite the lack of any evidence to show

that she suffered trauma of any duration; that she consulted a physician or counselor; that she took any medication; or that she suffered depression or loss of sleep (or any other physical symptoms). This award cannot be supported by such scant evidence. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998). Respondent appealed this portion of the verdict, contending that such damages must be stricken from the verdict or reduced to an amount supported by the evidence. The appellate court below did not reach this issue because it found against Petitioner on the entirety of the substantive liability claim. *Petition*, p. 5a. This issue would have to be resolved if the holding of the appellate court below is disturbed. Respondents therefore give notice of this issue as required by the rules of this Court.

CONCLUSION

Wherefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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